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Evaluating Sex Classifications: The Search for Standards

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RECENT DEVELOPMENT

Evaluating Sex Classifications: The Search for Standards

The latest Supreme Court ruling on legislation mandating disparate treatment based on sex has left lower courts facing challenges to such laws as unsure of their analyses as they are confident of their results. Six state and federal district court opinions[1] handed down within a few months of *Frontiero v. Richardson*[2] reflect both a new judicial propensity for invalidating legislative classifications based on sex and an uncertainty, expressed or implied, about the proper legal framework in which to do so.

Unquestionably, *Frontiero* rejected a legislative sex classification as violative of equal protection.[3] But the standard for future analysis of such classifications remains unsettled, since the justices failed to agree either to apply one of the traditional equal protection tests or to specify a new one. Not surprisingly, the succeeding cases combine elements of several different equal protection rationales. Although the holdings in these cases are similar, consistency in the future requires a Supreme Court formulation clearer than *Frontiero*'s.

In that case, plaintiff, a female Air Force lieutenant, was required by federal law to establish that she was the actual source of more than half of her husband's support in order to qualify for dependents' benefits for him, whereas similarly situated male officers automatically qualified for such

1. Aiello v. Hansen, 359 F. Supp. 792 (N.D. Cal. 1973), *prob. juris. noted*, 94 S. Ct. 838 (1973); Ballard v. Laird, 360 F. Supp. 643 (S.D. Cal. 1973), *cert. granted*, 42 U.S.L.W. 3457 (Feb. 19, 1974); State v. Chambers, 63 N.J. 287, 307 A.2d 78 (1973); Andrews v. Drew Municipal Separate School System, 6 E.P.D. ¶ 8727 (N.D. Miss. 1973); Bowen v. Hackett, 361 F. Supp. 854 (D.R.I. 1973); Healy v. Edwards, 363 F. Supp. 1110 (E.D. La. 1973), *cert. granted*, 42 U.S.L.W. 3458 (Feb. 19, 1974).

2. 411 U.S. 677 (1973). Although the Court recently invalidated public school policies mandating unpaid leave for teachers after the third or fourth month of pregnancy, it did not analyze the regulation as one which created a sex classification. Cleveland Board of Education v. LaFleur, 94 S. Ct. 791 (1974). *Cf.* Justice Powell's concurrence at 802-04.

3. 411 U.S. at 690.

benefits for their spouses.[4] When Lt. Frontiero was unable to offer the requisite proof, she and her husband brought suit in a three-judge federal district court under 28 U.S.C. section 1331; they sought declaratory and injunctive relief, and an award of back pay for the dependency allowance for medical and dental care and for quarters. They alleged that the disparate treatment of male versus female officers represented a violation of plaintiffs' rights under the due process clause of the fifth amendment.[5]

Frontiero's significance lies in the Court's equal protection analysis of the challenged regulations. The district court refused to find that the sex classifications of the statutes in question rendered them unconstitutional,[6] but the Supreme Court reversed, requiring that the fringe benefits be extended to female officers on the same basis as male officers:

> We . . . conclude that, by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove the dependency of her husband.[7]

Although eight justices subscribed to that judgment, there were three separate rationales for it, and no one of them was supported by a majority of the Court. Four justices subscribed to the "plurality" opinion declaring sex to be a suspect classification; Justice Stewart agreed that the statutes resulted in an "invidious discrimination" on the basis of sex; and three other justices concurred on the basis of a 1971 Supreme Court decision.[8] Predictably, subsequent decisions in the lower courts attest to the difficulty of interpreting this case.

Three of these decisions—*Ballard v. Laird*,[9] *Andrews v. Drew Municipal Separate School System*,[10] and *State v. Chambers*[11]—relied on the *Fron-*

4. Frontiero v. Laird, 341 F. Supp. 201, 203-4 (M.D. Ala. 1972). *See also* 10 U.S.C. § 1072(2) (1970) (dependency requirements for increased medical and dental care); 37 U.S.C. § 401 (1970) (dependency requirements for increased quarters allotments).

5. 341 F. Supp. at 203. Although the fourteenth amendment applies only to state governments, the Court has interpreted the due process clause of the fifth amendment to make the federal government responsive to equal protection guarantees. 411 U.S. at 680 n.5; Shapiro v. Thompson, 394 U.S. 618, 641-42 (1969); Schneider v. Rusk, 377 U.S. 163, 168 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

6. 341 F. Supp. at 203.

7. 411 U.S. at 690.

8. Reed v. Reed, 404 U.S. 71 (1971). Justice Rehnquist was the lone dissenter in *Frontiero*.

9. 360 F. Supp. 643 (S.D. Cal. 1973), *cert. granted*, 42 U.S.L.W. 3457 (Feb. 19, 1974).

10. 6 E.P.D. ¶ 8727 (N.D. Miss. 1973) (invalidating policy of Mississippi school district barring parents of illegitimate children from employment.

11. 63 N.J. 287, 307 A.2d 78 (1973).

tiero plurality's determination that "classifications based on sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."[12] The impact of this conclusion is perhaps best understood by contrasting the effect of a "strict judicial scrutiny" standard with the effect of the "rational basis" standard more typically applied to legislative classifications under traditional equal protection analysis. Classically, the Court has approached the examination of laws designating different treatment for different groups of people with a presumption that such categorizations are valid.[13] The challenged legislation has generally been measured against a "rational basis" test, to determine whether or not the questioned legislation is rationally related to a legitimate (*i.e.*, non-discriminatory) governmental objective. Application of this test requires a court first to ascertain the purpose of the statutory provision, next to find that purpose permissible in itself, and finally to discern a sufficient relationship between the legislative purpose and the classification. In practice, legislative classifications subjected to such a test have rarely been overturned; a benefit-of-the-doubt approach has regularly resulted in a finding that the "most probable purpose" of a challenged statute is a "permissible" one.[14] Likewise, courts have usually held that this legislative goal is sufficiently related to the challenged classification to sustain the statute.

Consequently, equal protection challenges to sexually discriminatory laws have failed, almost without exception, under this standard.[15] Moreover,

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12. 411 U.S. at 688. *See* Note, *Sex Discrimination by Federal Government in Payment of Fringe Benefits to Armed Services Personnel*, 87 HARV. L. REV. 116, 121 (1973) [hereinafter cited as *Sex Discrimination*]. Three additional post-*Frontiero* cases are discussed *infra* in text. Two other recent cases rejected challenges to sex classifications by distinguishing their own fact situations from *Frontiero*'s. *Magill v. Avonworth Baseball Conference*, 364 F. Supp. 1212 (W.D. Pa. 1973), held that the refusal to permit a female to play little league baseball was not a denial of equal protection because no state action was involved. In dicta, the court stated that *Frontiero* did not apply to contact sports. *Id.* at 1216-17. *Klein v. Mayo*, 367 F. Supp. 583 (1973) upheld a law denying a right to partition to a tenant by the entirety by finding that the law did not contain the sex classification alleged.

13. The rational basis test is alternatively characterized as "permissive review," "restrained review," or "minimal scrutiny." *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1077, 1087-1129 (1969) [hereinafter cited as *Developments*]; McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

14. *See Developments*, note 13 *supra* at 1078, and Goesaert v. Cleary, 335 U.S. 464 (1948). Recently, however, commentators have discerned a "mounting discontent" with this deferential equal protection analysis and have postulated an "overarching inquiry applicable " 'all' equal protection cases." Gunther, *The Supreme Court 1971 Term. Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 17 (1972) [hereinafter cited as Gunther].

15. *See generally* Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U.L. REV. 675 (1971) [hereinafter cited as Johnston], for an extensive survey of a century of cases concerning sex-discriminatory statutes

many equal protection challenges to sex classifications involved economic regulation,[16] an area in which the courts have been particularly reluctant to overturn the legislatures. And with comparable consistency for more than a century, the effect of applying the rational basis test outside the economic sphere has been to deny women, and occasionally men, many additional rights protected for members of the other sex. Such rights include those of patronizing places of public accommodation,[17] serving on juries and being tried by juries of one's peers,[18] attending co-educational schools,[19] receiving equality in criminal sentencing,[20] recovering in actions for loss of consortium,[21] retaining one's surname on a state driver's license application after marriage,[22] and being free of university curfew regulations.[23]

Continued frustration of their efforts under the rational basis test has led women's rights advocates to explore alternative theories to achieve their goals. One strategy has been to appeal for "strict scrutiny" of equal protection claims, on grounds that legislative classifications based on sex are

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regulating many areas of life. *See also* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 875-81 (1971) [hereinafter cited as Brown], providing equal protection case law support for the proposition that only a constitutional amendment will effectively outlaw discrimination based upon sex. Additional commentary is found in Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499, 1500-06 (1971) [hereinafter cited as *Constitutional Amendment*] and L. KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION, 149-92 (1971) [hereinafter cited as KANOWITZ].

16. As *Frontiero* itself observed, sex discrimination traditionally has been rationalized as " 'romantic paternalism,' which, in practical effect, put women not on a pedestal, but in a cage." 411 U.S. at 684. Judicially sanctioned economic limitations imposed on women, in the name of protectiveness for their presumptively weaker physical constitutions and emotional sensitivities, provide the most graphic illustration of this situation. *See, e.g.*, the concurrence of Justice Bradley in *Bradwell v. Illinois*, 83 U.S. 130, 140-42 (1872) (upholding an Illinois statute denying women the right to practice law in that state) and *Muller v. Oregon*, 208 U.S. 412 (1908) (sustaining an Oregon law which prohibited women from working in excess of ten hours per day).

17. Commonwealth v. Price, 123 Ky. 163, 94 S.W. 32 (1906). *But see* Seidenberg v. McSorley's Old Ale House, Inc., 317 F. Supp. 593 (S.D.N.Y. 1970) (finding that tavern's operation involves state action because of tavern's status as a public accomodation and state's pervasive liquor licensing scheme, and that there is no rational basis for said tavern's policy of excluding female customers).

18. Hoyt v. Florida, 368 U.S. 57 (1961). *But see* Healy v. Edwards, 363 F. Supp. 1110 (E.D. La. 1973), *cert. granted*, 42 U.S.L.W. 3458 (Feb. 19, 1974), and text discussion *infra*.

19. Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970), *aff'd mem.*, 401 U.S. 951 (1971).

20. State v. Heitman, 105 Kan. 139, 181 P.2d 630 (1919). *But see* State v. Chambers, 63 N.J. 287, 307 A.2d 78 (1973), and text discussion *infra*. On the history of sexually-disparate sentencing procedures in the United States, *see* Note, 23 CATH. U.L. REV. 389 (1974) [hereinafter cited as *C.U. Note*].

21. Miskunas v. Union Carbide Corp., 399 F.2d 847 (7th Cir. 1968).

22. Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971).

23. Robinson v. Board of Regents, 475 P.2d 707 (6th Cir. 1973).

"suspect."[24] If a court agreed with this reasoning, as the *Frontiero* plurality did, it would apply such review to the legislative classification. The strict scrutiny standard imparts a heavy burden on the government: if the rational basis test presumed the statute valid, the opposite presumption exists under strict scrutiny, so that only an "overriding purpose" or "compelling state interest" can save the classification. Furthermore, strict scrutiny mandates a very high degree of relevance of the classification to the state's asserted purpose in enacting it. It is not tolerant of classifications which are over- or under-inclusive of certain individuals relative to the purpose of the enactment. It does not assume facts and arguments favorable to the legislation and may indeed uphold the law only if there is no "less restrictive alternative" means of accomplishing an acceptable state goal.[25]

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24. Synonyms for strict scrutiny include "active review," "rigid scrutiny," and "close scrutiny." Particularly in the economic area, remedies outside equal protection have emerged, probably as a response to the growing percentage of women in the labor force—39.6 as of March, 1971, including 47.6 percent of all single women, 38.8 percent of all married women, and 65.5 percent of all divorcees. Waldman & Gover, U.S. Dep't of Labor, Bureau of Labor Statistics, *Marital and Family Characteristics of the Labor Force* (Special Labor Force Report #144, 1971). Certain mandatory maternity leave policies for public school teachers, for example, have been found to violate the due process clause of the fourteenth amendment in that they unjustifiably "penalize the pregnant teacher for deciding to bear a child." Cleveland Board of Education v. LaFleur, 94 S. Ct. 791, 800 (1974). Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1970), has been a significant weapon against sex discrimination through its prohibition of discrimination "with respect to . . . compensation, terms, conditions, or privileges of employment, because of . . . sex. . . ." See 411 U.S. at 687. Title VII permits discrimination against members of the indicated classes only "in those certain instances where . . . sex . . . is a *bona fide occupational qualification* [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise." (emphasis added.) 42 U.S.C. § 2000e-2(e) (1970). The so-called BFOQ burden has been analogized to the compelling state interest test demanded under strict scrutiny of equal protection cases. On the power of Title VII cases, like equal protection cases, to affect state laws, *see* Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971); Schaefer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972) (instructing private employers to disregard California maximum-hours limitation for women employees); and Johnston, *supra* note 15 at 701. The bond between Title VII and the equal protection clause may well be strengthened by the specific inclusion, through its 1972 amendments, of "governments, governmental agencies, and political subdivisions" as "employers" subject to suit for discriminating. Pub. L. No. 92-261, 86 Stat. 103, *amending* 42 U.S.C. § 2000e-(a)(2) (1970). Arguably, *Ballard v. Laird* and *Andrews v. Drew Municipal Separate School System*, discussed *infra* in text, could have included Title VII counts. *Frontiero* itself, if initiated subsequent to the 1972 amendments, could have been a Title VII case.

25. *See generally Developments, supra* note 13 at 1087-1127. Moreover, such classifications must perhaps be "necessary" to achieve a legitimate state purpose. *Id.* at 1102. Courts will likewise impose strict scrutiny where the legislation affects a "fundamental right" of the class which is marked for disparate treatment. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate termed fundamental). The determination of what is a "fundamental interest" is basically an *ad hoc* one. *Developments, supra* note 13 at 1130. Some scholars are therefore doubtful that it can systematically advance the economic and social position of women. *See* Brown, *supra* note 15 at 880, 884-85, and *Constitutional Amendment, supra* note 15 at 1506. There

The Supreme Court has been extremely selective, however, about which classifications it will term "suspect."[26] Since the enactment of the fourteenth amendment in 1868, the classification which has been most vulnerable to strict scrutiny has been that of race.[27] Similarly, alienage[28] and national origin[29] have been denominated suspect classifications. *Frontiero*'s plurality opinion represents the first Supreme Court statement indicating that such a designation should apply to sex as well.[30] Justice Brennan, for the plurality, based that conclusion on a comparison of the sex characteristic to the racial one.[31] He also acknowledged that the plurality had not been uninfluenced by various recent congressional actions "manifest[ing] an increasing sensitivity to sex-based classifications"[32] which complemented the plurality's view: Title VII of the Civil Rights Act,[33] the Equal Pay Act of 1963,[34] and the proposed Equal Rights Amendment[35] were indicated. The weight which the lower courts attach to this view will, of course, be crucial. Only rarely has an admittedly suspect legislative classification been upheld.[36] The position of those posing equal protection challenges to sexually discriminatory legislation affecting economic, social, educational, and other areas of life would be substantially strengthened. State legislatures and

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may be a relationship between the suspect classification and fundamental right doctrines. "As the nature of the classification becomes less invidious . . . the measure will continue to elicit strict scrutiny only as it affects interests progressively more important." *Developments, supra* note 13 at 1120-21.

26. *See, e.g.*, James v. Valtierra, 402 U.S. 137 (1971).

27. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) and *Developments, supra* note 13 at 1069.

28. Graham v. Richardson, 403 U.S. 365 (1971).

29. Oyama v. California, 332 U.S. 633 (1948).

30. *Cf.* Hoyt v. Florida, 368 U.S. 57 (1961) (upholding Florida's statute automatically exempting women from jury service).

31. 411 U.S. at 686. Justice Brennan analogized the sex and race characteristics by reference to the following: long and pervasive history of discrimination, high visibility, immutability, lack of relationship between the characteristic and any ability of those possessing it to perform in and to benefit society and the consequently groundless relegation of an entier segment of the population to an inferior legal status. For two earlier decisions finding sex a suspect classification, *see Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) and *U.S. ex rel. Robinson v. York*, 281 F. Supp. 8 (D. Conn. 1968). Although *Frontiero* never mentions *Sail'er Inn*, significant passages in *Frontiero* are drawn almost *verbatim* from the California case. *Compare* 411 U.S. at 684-87 *with* 485 P.2d at 540-41, 95 Cal. Rptr. at 340-41.

32. 411 U.S. at 687.

33. 42 U.S.C. § 2000e (1970).

34. 29 U.S.C. § 206 (1970).

35. S.J. Res. 8, 92d Cong., 2d Sess., 118 Cong. Rec. 4612 (daily ed. Mar. 22, 1972); H.R.J. Res. 208, 92d Cong., 1st Sess., 117 Cong. Rec. 9392 (daily ed. Oct. 12, 1971). The concurrence of Mr. Justice Powell reflects a different view of the proposed Equal Rights Amendment—i.e., an opportunity offered by Congress for state consideration of the precise issue which the plurality has undertaken to decide on its own. 411 U.S. at 692.

36. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944).

Congress, as well, rather than await lawsuits which would result in the invalidation of the restrictive statutes, would probably strike the measures or amend them so as to extend their benefits to both sexes. In the months since *Frontiero*, there appears to have been an about-face from the previously overwhelming trend of judicial deference to legislative sex classification,[37] with two federal district courts and a state supreme court agreeing that sex is a suspect classification.

The "Suspect Classification" Cases

In *Ballard v. Laird*, a male naval lieutenant challenged the constitutionality of the statutory procedure mandating his automatic discharge for having twice failed to achieve the grade of lieutenant commander, although a similarly situated female officer would not have been discharged until she had served in the Navy for 13 years.[38] The statute affecting Ballard was worded for applicability to "each officer";[39] female lieutenants, however, were subject to a separate provision addressed to "women officers."[40] Like the Supreme Court in *Frontiero*, the *Ballard* court applied equal protection analysis to the plaintiff's fifth amendment due process claim. Judge East, for the court, termed *Frontiero* "controlling" and added:

> Whether the discriminatory impact results in favoring the female rather than the male is no logical differential in the utilization of the teachings of *Frontiero*.[41]

After noting the lack of "any facts asserted by the defendants supporting . . . a rational basis,"[42] the court declared:

> [M]oreover, such a test is improperly asserted. For here, we are faced with an 'inherently suspect' classification, and such classifications 'are unconstitutional unless the State can demonstrate that such laws are "*necessary* to promote a *compelling* governmental interest." '[43]

The court also exhibited the typical impatience of strict scrutiny with anything less than the most serious governmental justifications. Regarding a

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37. *Compare* Robinson v. Board of Regents, 475 F.2d 707 (6th Cir. 1973), decided two months before *Frontiero*, *with* the sex classification cases discussed *infra* in text. *But see* Green v. Waterford of Education, 473 F.2d 629 (2d Cir. 1973) (pre-*Frontiero* invalidation of sex classification).

38. 360 F. Supp. at 643-44. Lt. Ballard had a great financial stake in this action: accepting the discharge meant severance pay of $15,000, while completing the 13-year commission would bring $200,000 in benefits.

39. 10 U.S.C. § 6352 (1970).

40. 10 U.S.C. § 6401 (1970).

41. 360 F. Supp. at 647.

42. *Id.*

43. *Id.* at 647-48 (citations omitted).

purported state interest in administrative efficiency or economy, Judge East commented:

> We assume without deciding that some [state interest] does exist, nevertheless *Reed* and *Frontiero*, each, held that government 'interest of some legitimacy' does not survive a judicial scrutiny and detection of an invidious discriminatory practice.[44]

For a remedy, the court permanently enjoined plaintiff's mandatory discharge and ordered that he be reinstated for purposes of all benefits and placed on the promotion list at that level to which he would have been assigned but for the discharge provision. Without so stating, then, the court invoked the benefits of the "women officers" provision for Lt. Ballard personally. Curiously, however, it was that statute, and only that statute, which the court termed "invidiously discriminatory."[45] A general discharge measure which applied the same terms to both men and women officers would apparently be acceptable, even if it consisted of the stricter terms previously applicable only to men. Thus, the court did not find that, in eliminating distinctions between men and women officers, the terms of the more generous provisions need be applied. The court left the choice of terms to the Navy. Of course, the choice could be in favor of the more liberal statute, so that the 13-year commissioned service discharge standard would apply to both men and women officers. What is significant about this part of the *Ballard* determination, however, is that the question of whether to extend the benefit in the future has been left to the government. Commentators who foresaw such situations urged the courts to assume for themselves the responsibility of extending the benefits to both sexes.[46] *Frontiero* itself had carefully specified that, since the original purpose of the fringe benefits offer was to attract career personnel to the armed services, the increased housing and medical/dental benefits involved in that case were not to be disturbed, "except insofar as they require a female member to prove the dependency of her spouse."[47]

Arguably, it becomes more difficult for a court to "extend benefits" when, as in *Ballard*, two laws form a "statutory scheme" that is unconstitutional. A court can perhaps cure an isolated statute it finds infirm by striking the word or words which create the offensive category. If a state liberal arts college operated under a statute which designated it "a school for men," for ex-

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44. *Id.* at 648.
45. *Id.*
46. *See, e.g.*, Kanowitz, *supra* note 15 at 180-91. Future officers could thus be discharged after two failures of promotion resulting from sheer "lack of vacancies in the grade of lieutenant commander", as Lt. Ballard was originally.
47. 411 U.S. at 691 n.25.

ample, a court finding the law unconstitutional could simply eliminate the words "for men." In the process of correction, the court also extends the benefits of attendance to women. In the *Ballard* situation, however, extending the benefits of the more generous statute would have been a complex undertaking. The court would have had to discard the provisions of the existing statute for "all officers" and substitute those of the women's statute. But on its face, the existing law for "all officers" contains no sex classification; only the measure specifying "women officers" is technically unconstitutional. Thus *Ballard* indicates that equalizing treatment among the sexes may not always mean improving treatment for the previously disadvantaged sex.

In a second case labeling sex a suspect classification, *Andrews v. Drew Municipal Separate School System*, the federal district court granted relief to two female plaintiffs who were denied employment in the defendant school district because each was the parent of an illegitimate child. The court found that the school district's unwritten policy against employing any person who had an illegitimate child violated equal protection guarantees on two grounds. First, it found that there was no rational basis for the classification "employees who are parents of illegitimate children" versus "all other employees." Alternatively, the court ruled that there was no compelling state interest to support the policy, which both inherently and as applied constituted an impermissible classification based on sex.[48] For purposes of the present inquiry, it is the "suspect classification" ground which is of interest. The court specifically defined that classification in *Andrews* to be "single women," since in practice a rule requiring the termination of an employee who had an illegitimate child could not disadvantage a man unless he knew of and admitted to paternity, while "[a] woman . . . is impregnated, gives birth, and often raises the child alone."[49] The court accepted plaintiff's argument that the rule could not in truth have been aimed at the "biological fact" of birth, but rather was directed against the practice of premarital coitus. To be constitutional, then, the regulation must be equally burdensome for male employees who indulge in permarital sex. Since the disadvantage did not weigh equally on men, the court, citing *Frontiero* for strict review, declared the sexual disparity "not constitutionally justified."[50]

In response to the defendants' further contention that a woman who en-

48. 6 E.P.D. ¶ 8727 at 5220 (N.D. Miss. 1973). This court found it unnecessary to consider the two plaintiffs' contention that the policy also created an unconstitutional classification based on race, a distinct turnabout from earlier cases where the racial classification was addressed and the sex discrimination count avoided. *Id.* at 5218. *See, e.g.*, Alexander v. Louisiana, 405 U.S. 625, 633 (1972).

49. 6 E.P.D. ¶ 8727 at 5223.

50. *Id.*

gages in premarital sex, becomes pregnant, and bears an illegitimate child voluntarily places herself in a classification in which she is *not* similarly situated relative to men and is thus justifiably treated differently from men, the court analogized from *Frontiero*:

> Voluntariness of a classification is certainly not an issue. In *Frontiero*, more burdensome treatment of a married woman officer in the armed services, although it was no doubt her voluntary choice to take connubial vows, was not tolerated.[51]

Imposing the traditional "heavy burden of justification" on defendants for having adopted a suspect classification, the *Andrews* court demanded a showing that the purpose of the regulation was "constitutionally permissible and substantial" and that the use of the classification in question was "necessary to the accomplishment of its purpose."[52] The burden, of course, was not carried.

The constitutionality of New Jersey's indeterminate sentencing procedures for women, in contrast to the minimum-maximum sentences given male offenders in the state prison, were considered by the Supreme Court of New Jersey in *State v. Chambers*. The court at the outset reviewed the disparity in treatment of male versus female offenders, and isolated three fundamental factors. First, the sentences of male offenders were fixed by the presiding judges and the maximum could be less than the statutory maximum. Women offenders, however, unless convicted of murder or manslaughter, had to be given an indeterminate sentence set at the statutory maximum for the particular crime and unalterable by the judge. Second, the minimum-maximum sentences for males could be reduced for "continuous orderly deportment," but there was no comparable provision applicable to women, except those convicted of murder or manslaughter. Third, male inmates were eligible for parole consideration after completing a certain portion of their sentences; no similar provision existed for female offenders.[53]

Justice Sullivan, for the majority, determined that both the disparate sentencing and the lack of "good time" credits denied women offenders equal protection of the laws. The effect of the judgment was to extend to female offenders the same sentencing procedures applied to male offenders. In

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51. *Id.* at 5224. Nor did the Supreme Court evaluate the "voluntary" nature of pregnancy when it invalidated certain mandatory maternity leave policies on due process grounds. Cleveland Board of Education, 94 S. Ct. 791 (1974). The question of whether bearing an illegitimate child is "voluntary" is in any case a debatable one. An unmarried woman can certainly become pregnant against her will; and prior to the *Roe v. Wade* decision, 410 U.S. 113 (1973), it would have been extremely difficult for her to terminate that pregnancy.

52. 6 E.P.D. ¶ 8727 at 5224. *See also* note 25 *supra.*

53. 63 N.J. at 292, 307 A.2d at 80.

addition, every female currently incarcerated was to be notified of her right to immediate re-sentencing to a minimum-maximum fixed term comparable to what she would have originally received had she been a man.

The court invoked "close judicial scrutiny" of the legislative classification and affirmed that "certain classifications by their very nature are inherently suspect."[54] The court did not, however, specifically state that sex classifications fell into the "inherently suspect" category, nor did it cite *Frontiero* for that proposition. Instead, *Chambers* set forth a "suspect classification" doctrine which triggered the strict scrutiny standard for determining "whether a fundamental right is being impaired." It is unclear whether or not the court was thereby intending to state that both a "suspect classification" *and* a "fundamental right" must be found before a court can invalidate a classification under strict scrutiny. The United States Supreme Court, however, has frequently articulated the test for strict scrutiny—*i.e.*, that a finding of *either* a suspect classification *or* a fundamental interest will generate such scrutiny, and that *only* a finding of compelling state interest will justify a classification subjected to such scrutiny.[55]

Thus, none of the three decisions really demonstrates a firm reliance on *Frontiero*'s plurality opinion. The *Chambers* court apparently lacked sufficient confidence in that opinion to state its holding precisely in terms of the unconstitutionality of the suspect classification within New Jersey's sentencing scheme. *Andrews* invoked the "sex-as-a-suspect-classification" doctrine only for its alternative holding. The bulk of that decision attacked the larger classification, "employee parents of illegitimate children," and dissected the school board's defenses of its policy using the rational basis approach. *Ballard*, seemingly the boldest in its acceptance of the plurality's suspect classification doctrine, also found support in an earlier, more restrained sex discrimination case, *Reed v. Reed*.[56]

Reed and "Rationality Scrutiny"

In *Reed*, a unanimous Supreme Court found that an Idaho probate statute giving automatic preference to males for appointment as administrators of decedents' estates violated the equal protection clause. The Court there asserted that it was testing "whether a difference in the sex of competing applicants for letters of administration bears a rational relationship"[57] to a state objective that is sought to be advanced. No suspect classification was

54. 63 N.J. at 295, 301, 307 A.2d at 82, 84.
55. *See generally Developments, supra* note 13; note 25 *supra*; Gunther, note 14 *supra* at 9 n.36; and *C.U. Note*, note 20 *supra*.
56. 404 U.S. 71 (1971).
57. 404 U.S. at 76.

specifically found, nor was strict scrutiny explicitly invoked. However, the *Ballard* case cited *Reed* for the proposition that the sexually discriminatory discharge statutes represented an "arbitrary legislative choice . . . inconsistent with the command of the equal protection clause."[58] If *Reed* is not a "strict scrutiny" case, it seems different, nevertheless, from the traditional rational basis cases. As the *Frontiero* plurality observed, *Reed* does not fit the requirement of the rational basis test that "a legislative classification must be maintained unless it is 'patently arbitrary' and bears *no rational relationship* to a legitimate governmental interest."[59] The Supreme Court in *Reed* admitted that the claimed objective of the challenged Idaho statute —*i.e.*, reducing the workload of the probate courts—was "not without some legitimacy."[60] A purpose with "some legitimacy" would ordinarily satisfy rational basis requisites for sustaining a legislative sex classification which furthered that purpose. Moreover, a court using the rational basis test would willingly strain to identify a legitimate purpose in an effort to uphold the classification.[61]

Because of these considerations, *Reed*'s posture as an equal protection case has been variously interpreted. If the plurality saw *Reed* as foreshadowing their own finding that sex is a suspect classification, the concurring justices apparently read the earlier case differently. Justices Powell, Burger, and Blackmun definitively rejected the suspect classification rationale, but cited *Reed* as the proper basis for resolving *Frontiero*.[62] They declined to advance any particular theory of *Reed*, however.

In an effort to fill that vacuum, three federal district courts implemented a kind of intermediate equal protection analysis for sex-based legislative classifications after *Frontiero*. In so doing, they relied in part on the construct of Professor Gerald Gunther in a leading commentary on the equal protection cases emerging from the 1971 Supreme Court term.[63] According to Professor Gunther, the Supreme Court in *Reed* and other recent equal protection cases may have been seeking "to blur the distinctions between strict and minimal scrutiny precedents by formulating an overarching inquiry applicable to 'all' equal protection cases."[64] In this view, all legis-

58. *Id.* at 75-76.
59. 411 U.S. at 683 (emphasis added). *Cf. Cleveland Board of Education v. La Fleur*, 94 S. Ct. 791 (1974), decided on due process grounds, in which Justice Stewart for the Court noted that "public school maternity leave rules . . . must not needlessly, arbitrarily, or capriciously impinge upon [child-bearing]." *Id.* at 796.
60. 404 U. S. at 76.
61. *See Developments, supra* note 13 at 1077.
62. 411 U.S. at 691-92 (concurring opinion).
63. *See* Gunther, note 14 *supra.*
64. *Id.* at 17.

lative classifications, including those based on sex, would have to withstand what has been termed "rationality scrutiny" in order to survive court action.[65]

Under traditional equal protection analysis, the invocation of the strict scrutiny standard signaled invalidation of the statute, while the rational basis test just as predictably forecast non-intervention. By contrast, rationality scrutiny would be applied on a case-by-case basis; the outcome would not flow inexorably from the very invocation of that standard.[66] Courts employing rationality scrutiny would not automatically defer to most conceivable legislative purposes or to imaginable facts justifying statutory classifications, as was done under the rational basis test. Nor would the courts so readily tolerate classifications which affect a larger group of people than necessary for the achievement of the legislative goal (so-called "over-inclusiveness") or a group too small to attain the goal (so-called "under-inclusiveness"). Over- and under-inclusive categories were largely ignored when the rational basis standard was applied, and legislation was sustained despite them.[67] The distaste for such categories under rationality scrutiny reflects one aspect of what Professor Guther terms "a constitutional requirement . . . that legislative means must substantially further legislative ends."[68] For example, if a state creates a weight-lifting limitation for working women as a means to its end of increasing job safety, it must establish that the sex classification does further that goal. Arguably, if there are many women who can lift more than the statutory maximum, or many men who cannot, then the classification is either too broad or too narrow to serve the asserted purpose of job safety, and it must be invalidated.

The requirement of a close connection between the ends and means of legislation has, theoretically, always inhered in the equal protection doctrine. Under the rational basis test, however, the principle has been only loosely retained. Rather, the presumption that legislatures act constitutionally has been so strong that a court was not bound by the usual source materials in determining what the purpose of a measure was, but could instead imagine both what the purpose may have been and what evidence might possibly support that imagined purpose. Rationality scrutiny would examine a legislative classification in terms of a statutory purpose having "substantial basis in actuality, not merely in conjecture," and would define that purpose exclusively by reference to materials physically presented to the court.[69] Pre-

65. *Id.* at 21. Subsequently, another writer termed this new mode of analysis "strict rationality." *See Sex Discrimination*, note 12 *supra*.
66. *Id.* at 19.
67. *See, e.g., Goesaert v. Cleary*, 335 U.S. 464 (1948).
68. Gunther, note 13 *supra* at 20.
69. *Id.* at 20-21.

sumably, though, it would agree to assess a legislative classification in terms of any constitutional purpose duly offered by the state; it would not demand that the purpose asserted be "compelling," as the strict scrutiny standard does.

If in fact rationality scrutiny has become a viable judicial tool, its precise contours are still unknown. In some instances, courts have rejected purposes advanced by the state while disclaiming the use of strict scrutiny. Furthermore, the degree to which the legislative classification must further the asserted purpose is not clearly formulated, at least insofar as rationality scrutiny may have been applied to sex classifications. In *Reed*, Idaho's stated goal of probate efficiency would seem to have been sufficiently served through the legislative sex classification to meet rationality scrutiny requisites. Did the Justices, in rejecting that classification, want proof of a closer connection? Or was it primarily a case of the Court's dissatisfaction with the importance of the legislative goal relative to the classification, an approach more typical of strict scrutiny, as the *Frontiero* plurality believed? Professor Gunther's article raises, but does not resolve, these issues.[70]

To the extent that the rationality scrutiny model incorporates judicial activism in the social and economic spheres, its use would increase the likelihood of prevailing in challenges to legislative sex discrimination over the likelihood which exists when courts apply the rational basis standard. Perhaps the most significant limitation of rationality scrutiny as proposed, however, would be its emphasis on the *means* of accomplishing a legislative purpose, to the exclusion of any significant attention to the purpose itself. As has been indicated, strict scrutiny requires a state to show that it has instituted a classification only because the purpose of the measure is a "compelling" one, but such a showing would not be necessary under rationality scrutiny. Moreover, the rationality scrutiny standard would not mandate that the means selected—*e.g.*, a sex classification—be the "least restrictive" or the "only" means possible for accomplishing the legislative goal. Such a constraint has often been articulated as an element of strict scrutiny, how-

70. *Id.* at 33-34, 35-37. As in *Reed*, the Court in *Cleveland Board of Education v. LaFleur*, 94 S. Ct. 791 (1974), found that the state had proffered two "legitimate" objectives to justify its mandatory maternity leave policies for school teachers: continuity of instruction and elimination of teachers who are physically incapable of performing their jobs. Employing due process, rather than equal protection, analysis, the Court found that the first goal bore "no rational relationship" to the policy. The Court was willing to assume that the policy did serve the second goal, at least with respect to some teachers, but found that the "conclusive presumption" of incapacity nevertheless violated due process. *Id.* at 796-99. An attempt to find a parallel equal protection analysis for this case would thus appear to remove it from a pure "rational basis" category and to give it, like *Reed*, characteristics of both "strict scrutiny" and "rationality scrutiny."

ever. In child custody situations, for example, rationality scrutiny might be fulfilled when the state goal is found to be protection of minors and the state court practice is to indulge in the presumption that mothers are to be preferred over fathers. Under strict scrutiny, however, the state might have to show that the sex classification inherent in the practice was the least restrictive, or even the only, means by which the state's purpose could be served. Theoretically, then, a court employing rationality scrutiny, unlike one using the "rational basis" test, would examine carefully the relationship between a challenged legislative classification—though not "suspect"—and the purpose which that classification putatively serves. The court, however, would not impose requirements so rigid as those invoked under strict scrutiny; it would sustain a statute so long as it found that the classification served a valid goal and that goal has been duly proffered in court by the state.[71]

Rationality Scrutiny Applied

While the rationality scrutiny model has not yet solidified and no Supreme Court case or commentary squarely indicates that the standard applies to sex classifications, three federal district courts have nevertheless included it in their post-*Frontiero* analyses of such classifications. *Aiello v. Hansen*,[72] *Bowen v. Hackett*,[73] and *Healy v. Edwards*,[74] admittedly hesitant to rely on *Frontiero*'s strict scrutiny formulation because it was not endorsed by a majority of the Court, have instead combined rationality scrutiny theory with language from both *Reed* and *Frontiero*.

Scarcely three weeks after *Frontiero* was decided, a California federal court ruled unconstitutional the state's insurance code provision which exempted from coverage all pregnancy-related work loss until 28 days following termination of pregnancy.[75] Judge Zirpoli for the *Aiello* Court assumed without discussion that a legislative classification based on pregnancy, as a "sex-linked characteristic," is a sex classification. Presumably, the fact that pregnancy affects only women was enough to convince the court that differential treatment based on that condition constitutes categorization by sex. Not all courts have agreed.[76] Turning to *Reed* and *Frontiero*, Judge

71. Gunther, note 13 *supra* at 21. *See also Sex Discrimination*, note 12 *supra* at 124 and n.48.

72. 359 F. Supp. 792 (N.D. Cal. 1973), *prob. juris. noted*, 94 S. Ct. 838 (1973).

73. 361 F. Supp. 854 (D.R.I. 1973).

74. 363 F. Supp. 1110 (E.D. La. 1973), *cert. granted*, 42 U.S.L.W. 3458 (Feb. 19, 1974).

75. 359 F. Supp. at 801.

76. The Supreme Court did not find a sex classification in the mandatory pregnancy leave policies which it recently invalidated on due process grounds. Cleveland Board of Education v. LaFleur, 94 S. Ct. 791 (1974). The position that pregnancy classifications are not sex classifications is articulated in *Cohen v. Chesterfield County School*

Zirpoli commented that "it remains unclear how sex discrimination fits within equal protection doctrine."[77] The court interpreted *Frontiero* as an "intentional[ly] restrain[ed]" opinion and observed that "the challenged statute is invalid even under the *Reed* test."[78] The *Aiello* court accepted the rationality scrutiny theory of *Reed*, rather than the *Frontiero* plurality's view of that case, and said, "It appears . . . that *Reed* is not intended to establish a special equal protection test for sex discrimination . . . but is probably only one of several cases that mark a general shift in the rational basis test."[79]

Appropriately, *Aiello*'s explicit holding faults the exclusionary statute for being based on a classification which does not have a rational and substantial relationship to a legitimate state purpose.[80] Indeed, *Aiello* represents a painstaking examination of all of the state's justifications—*i.e.*, that the exclusion of pregnancy-related disabilities keeps the disability insurance program solvent; that if pregnancy disabilities were included, women would receive more than their share of benefits; that inclusion of disability payments for pregnancy, which is frequently voluntary, might promote abuse of the program; and that there would be administrative difficulties in determining whether or not a woman were truly disabled due to pregnancy. In response to these assertions, the court cited the lack of any proof that the inclusion of pregnancy disability benefits would destroy the program and the common misconception on the part of the state that pregnant women in general are incapacitated for long periods.

Noting the hardship which this stereotype has brought on women, who are as a result of it often denied both work *and* unemployment benefits, the court suggested in dicta that California could put limitations on amounts of disability claims generally, rather than exclude arbitrarily a whole class because of speculations about the size of that class's claims. As to the state's argument on the possibility of abuse due to the voluntary nature of pregnancy-related disabilities, the court pointed out that many such disabilities are not voluntary, as in the case of the named plaintiffs' miscarriage and tubal ligation, while other conditions which are covered under the program (*e.g.*, plastic surgery) are voluntary.[81] The court said that the assertion of

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Board, 474 F.2d 395, 397 (4th Cir. 1973), *rev'd on other grounds*, 94 S. Ct. 791 (1974).

77. 359 F. Supp. at 796.

78. *Id.*

79. *Id.* *Cf.* the late case of *Hanson v. Huff*, — Wash. —, 517 P.2d 599 (1974) (invalidating Washington's statute disqualifying pregnant women from unemployment insurance benefits and using strict scrutiny standard, on authority of *Reed* and *Frontiero*).

80. *Id.* at 797.

81. *Id.* at 800. *See* note 51 *supra*.

administrative complications in ascertaining pregnancy-related disabilities is, perhaps, fundamentally objectionable in its attempted rejection of hearings on the merits. In any case, the court noted that the claim could be dismissed on the ground that similar medical verification is necessary in connection with any disability currently covered by the plan. The court also enjoined future refusals to grant pregnancy disability benefits under the program and ordered immediate compensation for pregnancy-related disabilities to the named plaintiffs. Finally, *Aiello* extended the benefits of the California Unemployment Insurance program to the class of women previously excluded by expressly voiding that clause of the Code which had exempted them.[82]

The very diligence of the *Aiello* court's effort to substantiate its invalidations of a sex classification testifies to the possible restrictions of judicial analysis by rationality scrutiny. Had a racial, rather than a sexual, classification been at issue—such as a limitation on disability benefits for those having sickle cell anemia—government arguments of financial savings and prevention of abuses would never have merited the degree of attention afforded them in *Aiello*. Because the racial classification is so well established as "suspect," it is very unlikely that such a measure would ever have passed a legislature. Under courtroom challenge it would be subjected to strict scrutiny, and only the showing of clear governmental "necessity" could save it. The pregnancy disability exclusion, on the other hand, could arguably have survived mere rationality scrutiny, had the court found merit in any one of these contended governmental goals and a substantial relationship between that goal and the sex classification.

Sexually discriminatory clauses in the Rhode Island unemployment compensation and temporary disability insurance laws were at issue in *Bowen v. Hackett*. By operation of these clauses, women applying for dependents' allowances with their unemployment compensation or temporary disability insurances were required to establish a "dependency-in-fact" status for their children to the satisfaction of the agency director. No similar provision existed for male applicants.[83] In practice, the provision required that those women investigated prove themselves to be the "total" source of support for their dependents. As Chief Judge Pettine for the court summarized the procedure, female applicants were treated differently from male applicants in three respects: (1) women had to prove dependency where similarly situated men did not—*e.g.*, women whose children lived with them usually had to prove dependency but men whose children lived with them did not;

82. 359 F. Supp. at 797-801.
83. 361 F. Supp. at 857-58.

(2) women had to prove "total" dependency of their children, while men were required to show, if anything, a "contribution" to support; and (3) women were denied dependents' allowances through the mere existence of a court order requiring support payments from a male, regardless of that male's defiance of the order.[84]

Chief Judge Pettine noted the similarity of *Bowen*'s facts to *Frontiero*'s. Like Judge Zirpoli in *Aiello*, however, he observed the division in the *Frontiero* court and concluded, "It is somewhat difficult to surmise what the appropriate standard of review in this case should be." But "[a]t the minimum, it would seem, the state must meet the standard of *Reed*."[85] For Chief Judge Pettine this meant that the discriminatory statutory scheme must have been proven reasonably related to a legitimate state interest. In a footnote the judge commented, though, that *Reed*'s rational basis test appears to be different from the traditional one: "The exact content of *Reed*'s rational basis test is uncertain."[86] The court quickly dismissed the state's "administrative convenience" argument, to the effect that a father can normally be considered the principal source of support for minor children, on the authority of both *Reed* and *Frontiero*.

The court conceded that the second government justification, avoiding double payments, "may be a legitimate interest but it is not reasonably accomplished by these discriminatory means."[87] Avoiding double payments thus seems to have sparked in the *Bowen* court a response similar to that of the Supreme Court when it considered the "probate efficiency" goal in *Reed*. As in *Bowen*, *Reed*'s goal was "not without some legitimacy." That that acknowledgement was not enough for either court to sustain the sex classification appears to remove both opinions from the rational basis category, and arguably from rational scrutiny, as well. Yet each case has studiously avoided the invocation of strict scrutiny. Finally, like *Frontiero* and *Aiello*, the *Bowen* court found the state's allegations of financial savings under the existing procedure unproven. *Bowen*'s holding articulates impatience with its own analytical constraints as surely as it demonstrates certainty about its result:

> In short, this Court finds no justification, *reasonable, compelling, or otherwise*, for the discrimination against women in the statute

84. *Id.* at 859. The ex-husbands of plaintiffs Mary Bowen and Sharon Ferri were both under court orders to contribute to their children's support. Plaintiff Ferri's ex-husband was more than $1,000 in arrears, and she provided over 50 percent of her child's support. *Id.* at 857.

85. *Id.* at 860-61.

86. *Id.* at 861 n.6.

87. *Id.* at 861. *See* note 70 *supra*.

> and in defendant's administrative practices as to dependent's allowances.[88]

With *Frontiero* for a model, the court fashioned an extension-of-benefit remedy, as had been done in *Aiello* and *Chambers*. The clauses in each statute requiring women to prove their children's dependency to the satisfaction of the agency director were accordingly stricken.[89]

In *Healy v. Edwards*, a Louisiana constitutional provision and the statutes enacted thereunder exempting women from jury service unless they affirmed their desire to serve in writing, were held to deny equal protection to that class of women whose civil suits were pending in state court.[90] The requirement that women volunteer for jury service violated equal protection in two basic ways. First, potential women jurors were selected differently from similarly situated men, a condition expressive of the thesis that women must be shielded from jury duty and implying sexual prejudice.[91] Second, female litigants were forced to have their cases decided by disproportionately male juries, which impinges upon the right to a jury representative of a fair cross-section of the community.

Selecting its standard of review, *Healy* reflected that older Supreme Court cases[92] condoning sex classifications in jury selection statutes had been "eroded by *Reed* . . . and crevassed by *Frontiero*. . . ."[93] Acknowledging, however, that *Frontiero* was not the definitive declaration of sex as a suspect classification, Judge Rubin for the court deduced from *Reed* that the minimum constitutional standard must be similar treatment for men and women "who are similarly situated *with respect to the objectives of the legislation.*"[94] Judge Rubin established that males and females *were* similarly situated relative to the legislative objective of "selecting juries"[95] by reference to Louisiana's ready acceptance for jury service of those women who do volunteer and by review of the steady advancement of women's position in the economic, social, and political world. While acknowledging reliance on *Reed*,[96]

88. 361 F. Supp. at 862 (emphasis added).
89. *Id.* In fact, the challenged language had already been deleted, but plaintiffs nevertheless went forward, asking a declaratory judgment and retroactive payments.
90. 363 F. Supp. 1110 at 1117.
91. *Id.* at 1114. *But see* Hoyt v. Florida, 368 U.S. 57, 62 (1961) where the Supreme Court upheld a nearly identical statute, in part because the state could reasonably consider "woman . . . as the center of home and family life."
92. Hoyt v. Florida, 368 U.S. 57, 62 (1961). and Strauder v. West Virginia, 100 U.S. 303 (1879). Note that *Healy* has squarely opposed the 12-year-old *Hoyt* on the ground that *Frontiero* and *Reed* have effectively, if not explicitly, overruled it. 363 F. Supp. at 1117. The Court's grant of certiorari in the *Healy* case provides an opportunity for that explicit overruling of *Hoyt*.
93. 363 F. Supp. at 1113 [citations omitted].
94. *Id.* at 1113-14.
95. *Id.* at 1114.
96. *Id.* at 1113.

Healy makes no explicit claim to the use of rationality scrutiny. And if that standard requires examination of legislative means for their relatedness to legislative goals, it is noteworthy that *Healy* appears not to have analyzed *any* rationalizations propounded by the state before invalidating the legislation. Although it did not explicitly so state, the *Healy* court, stressing as it did the importance of representative and impartial juries, would probably have been disinclined to uphold the challenged sex classification for anything less than a compelling state interest.[97]

Conclusion

The study of six recent cases thus discloses a dilemma in the state and lower federal courts about the status of legislative sex classifications. *Ballard* and *Andrews* purported to subscribe to the *Frontiero* plurality, finding that sex classifications are suspect under the equal protection clause but each also sought support outside that opinion. *Chambers* too invoked the suspect classification doctrine, although the case failed to articulate either a positive reliance on *Frontiero* or a clear formulation of the standard of review adopted.

Prior to *Frontiero*, there was speculation about the *Reed* case as something of a departure from traditional rational basis analysis—that is, as representative of an emerging "rationality scrutiny." The same commentary, however, indicated that *Reed* did not quite fit that new projection and that, in any case, the model itself had not completely evolved. When *Frontiero* appeared, it not only failed to announce a definitive position on sex classifications, but also increased the confusion about *Reed* by presenting in its plurality and concurring opinions two irreconcilable interpretations of the latter case. Neither view clearly posited a rationality scrutiny standard, but two lower court cases, *Aiello* and *Bowen*, saw that test as the lowest common denominator by which to evaluate sex classifications in the wake of *Frontiero*. The *Healy* case claimed *Reed* as the source of its review standard, but neither mentioned nor demonstrated adherence to the rationality scrutiny model or to any other known equal protection test.[98] In this connection, it is worth noting that there has been no formal abandonment of the old rational basis standard. Even now, a court could imitate *Aiello, Bowen* and *Healy* in finding that *Reed* expresses the proper standard of review for sex classifications, but then reject any notion of an intermediate standard such as rationality scrutiny.[99]

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97. *See Sex Discrimination*, note 12 *supra* at 124.

98. *See also Murphy v. Murphy*, Civil No. 13-75633 (Fulton County, Ga. Super. Ct., filed Jan. 24, 1974) (alimony statutes invalidated on undifferentiated authority of *Reed* and *Frontiero*).

99. One late case explicitly maintained that the Supreme Court had not foresaken

It is apparent that a clear statement from the Court as to the proper test is essential for the avoidance of widely dissimilar results depending on the forum. It is true that all six cases here reviewed invalidated sex classifications despite differing rationales. It is also true, though, that without a more definitive standard, there will be repetitions of the discrepancies seen among the six cases discussed, with some opinions invoking strict scrutiny, some rationality scrutiny, and some apparently making *ad hoc* determinations. This can only lead to inconsistent methodology and results in future cases. In the child custody hypothetical, a "strict scrutiny" jurisdiction might invalidate the practice of automatically awarding custody to the woman, barring any showing that the state was compelled to implement the sex classification as the only, or certainly the least restrictive, means of assuring maximum protection to the child. The rationality scrutiny standard, on the other hand, could uphold the practice so long as the constitutional goal was the one actually asserted by the state and the sex classification substantially served that goal. A jurisdiction which adopted no clear standard could find that the practice violated the "spirit" of *Reed* and *Frontiero* even if it did substantially further a valid state objective. Alternatively, that same jurisdiction could uphold the classification by distinguishing the child custody situation from *Reed* and *Frontiero* in reliance on any one of numerous subjective assessments, such as the "basic" societal relationship of mother and child.[100] Because the issues involved in challenges to legislative sex classifications often touch vital constitutional rights, their resolutions should not differ depending upon the courtroom in which the action is brought.

The Supreme Court's recent invalidation of public school policies man-

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the rational basis test for sex classifications in favor of rationality scrutiny. Rather, the justices had merely evidenced commitment to the more pragmatic analysis of such classifications. *See* Weisenfeld v. Secretary, 367 F. Supp. 981 (1973). Acknowledging that the rational basis test would trigger the opposite result, the *Weisenfeld* court nevertheless found that a federal statute providing Social Security benefits for widows, but not widowers, violates the equal protection component of the fifth amendment because it creates a suspect classification based on sex which cannot be justified by a compelling state interest. *Id.* at 990-91.

100. *See* the recent case of *Arends v. Arends*, — Utah 2d —, 517 P.2d 1019 (1974), in which a father appealed from an award of custody to his ex-wife on the ground that the statutory presumption favoring mothers violated equal protection. Denying relief on other grounds, the court commented that the father's contention had no merit in any case since he "was [not] equally gifted in lactation with the mother." *Id.* at 1020. Having discarded the equal protection claim, the Court made no reference to either *Frontiero* or *Reed*. In a case decided two days later, however, the same court employed a "reasonable basis" test to uphold a statute setting the age of majority at 21 for men and 18 for women, citing the "widely accepted" idea that females mature earlier than males and ignoring *Frontiero* and *Reed*. Stanton v. Stanton, — Utah 2d —, 517 P.2d 1010, 1012 (1974).

dating unpaid leave for teachers after the third or fourth month of pregnancy has not obviated the possibility of such diverse results. The determination in *LaFleur v. Cleveland Board of Education*[101] was made on due process grounds, with no finding that the policies contained sex classifications. If the analysis in the case has equal protection parallels, it is unclear whether "strict scrutiny" or "rationality scrutiny" is the dominant model.[102] Having agreed to review the *Aiello, Ballard,* and *Healy* cases, the Court may be preparing to dispel the confusion surrounding sex classifications. A decision is also pending in *Shevin v. Kahn,* a case arising before *Frontiero,* in which the Florida Supreme Court upheld a statute affording tax exemption to widows but not widowers.[103]

Supreme Court action to eliminate rulings on sex classifications by judicial fiat could take any one of several forms. A renewed commitment to the old rational basis standard is an option, but not a probable one; it would require a virtual overruling of *Frontiero* and *Reed* and a repudiation of many contemporary legal and societal trends. Alternatively, the Court could articulate the rationality scrutiny standard and provide the substandards necessary to apply it consistently in challenges to sex classifications. Inherent in such a test, however, is wide latitude for individual judges to determine how much of a relationship between legislative means and ends satisfies equal protection. It is therefore submitted that maximum uniformity of results in this area can be achieved only through a definitive invocation of the strict scrutiny doctrine. Substantial gains in economic and psychological well-being for both men and women are likely to flow from that choice.

Marilyn S. Gross

101. 94 S. Ct. 791 (1974).

102. *See* note 70 *supra.*

103. Fla., 273 So. 2d 72 (1973), *prob. juris. noted,* 94 S. Ct. 283 (1973). The Florida court found that the measure bore a "fair and substantial relation" to the state purpose of reducing the economic disparity between men and women and therefore satisfied the requirements of *Reed. Id.* at 73.